No. 87-2048

In the Supreme Court of the United States

OCTOBER TERM, 1989

TEXACO INC., PETITIONER

v.

RICKY HASBROUCK, d/b/a/ RICK'S TEXACO, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE SUPPORTING PETITIONERS

KENNETH W. STARR
Solicitor General
JUDY WHALLEY
Acting Assistant Attorney General
THOMAS W. MERRILL
Deputy Solicitor General
MICHAEL R. DREEBEN
Assistant to the Solicitor General
CATHERINE G. O'SULLIVAN
STEVE MACISAAC
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

KEVIN J. ARQUIT
General Counsel
Federal Trade Commission
Washington, D.C. 20580

QUESTION PRESENTED

The United States will address the following question:

Whether a supplier is liable under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a), if it gives a functional discount to an independent wholesaler in excess of the wholesaler's costs, and the wholesaler passes on a portion of that discount to retailers, thereby undercutting the price that the supplier offers directly to retailers.

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INTEREST OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION

The Department of Justice and the Federal Trade Commission enforce the federal antitrust laws. The Federal Trade Commission has developed much of the jurisprudence under the Robinson-Patman Act through administrative enforcement proceedings. This case presents the question whether a supplier is liable under Section 2(a) of the Robinson-Patman Act, 15 U.S.C. 13(a), if it gives a functional discount to a wholesaler in excess of the wholesaler's costs, and the wholesaler "passes on" a part of that discount to certain retailers, thereby injuring other retailers who purchase directly from the supplier. Because this question implicates the procompetition policies underlying the antitrust laws and the proper interpretation of the Robinson-

Patman Act, the government has a strong interest in its correct resolution. At the certiorari stage, the government filed a brief in response to the Court's invitation to the Solicitor General to express the views of the United States.

STATEMENT

1. Petitioner Texaco Inc. sold gasoline and other petroleum products in the Spokane, Washington area until 1981. Respondents are 12 individuals (or their successors in interest) who, from 1972 to 1981, operated retail gasoline stations in Spokane that sold gasoline under the Texaco brand name. J.A. 19-20.

Texaco sold gasoline directly to the respondents at a delivered "retail tank wagon" (RTW) price. It sold the same gasoline to at least two other firms in Spokane—the Dompier Oil Company and the Gull Oil Company—at a lower price, under distributor contracts providing for a discount from the RTW price. At some points during the relevant period, both Dompier and Gull sold some gasoline to retail stations neither owned nor controlled by them at prices that were lower than the RTW price charged by Texaco to retailers. The prices paid by respondents and by the customers of Dompier and Gull for gasoline were reflected in the pump prices charged to motorists. Pet. App. A4-A5; J.A. 27, 136-137, 149.

2. a. In January 1976, respondents filed suit against Texaco in the United States District Court for the Eastern District of Washington. The complaint, as amended, alleged that Dompier and Gull competed with respondents "in the resale of gasoline motor fuels" and that petitioner's sale of gasoline to Dompier and Gull at lower prices than those charged the respondents for gasoline of "like kind and quality" tended to "substantially lessen competition" between the respondents and Dompier, Gull, and the stations Dompier and Gull supplied, in violation of Section 2(a) of the Robinson-Patman Anti-Discrimination Act (Robinson-Patman Act), 15 U.S.C. 13(a). C.A. E.R. 13-14.

After a four week trial in late 1979, the jury rendered a verdict in favor of each respondent on the Robinson-Patman Act claim

and awarded damages totalling $849,484. Petitioner moved for judgment notwithstanding the verdict challenging, *inter alia*, the court's instructions on damages. The district court granted the motion because it concluded that the damages theory under which the case had been submitted to the jury was no longer valid, and respondents appealed. While the appeal was pending, this Court addressed the same damages issue in *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981), and rejected the view that plaintiffs in a Robinson-Patman Act case are entitled to "automatic damages" equal to the amount of an illegal price discrimination. Thereafter, the court of appeals held that respondents were entitled to attempt to prove damages under a theory consistent with *J. Truett Payne*, and it remanded the case for a new trial on both liability and damages. *Hasbrouck* v. *Texaco, Inc.*, 663 F.2d 930 (9th Cir. 1981), cert. denied, 459 U.S. 828 (1982).

b. The case was tried again in June 1985. Petitioner stipulated that it charged respondents a higher price for gasoline than it charged Dompier or Gull. See J.A. 29-31. At trial, the evidence showed that the stations owned or supplied by Dompier often posted *retail* prices that were barely, if at all, higher than the *wholesale* (RTW) price that petitioner charged respondents for their gasoline.[1] In addition, a number of respondents testified about complaints they received from customers concerning the difference between their retail prices and the prices charged by the stations owned or supplied by Dompier.[2]

Respondents also introduced evidence that they had complained repeatedly to petitioner, and that petitioner was aware

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[1] See, *e.g.*, Tr. 243, 351, 400, 493, 600, 640. Respondents introduced evidence pertaining to both Dompier and Gull, but the case focused primarily on the effect of the challenged discount on their ability to compete with stations that Dompier owned or supplied.

[2] See, *e.g.*, Tr. 238, 243, 249, 401, 600-601. Several former customers of particular respondents testified that they started purchasing some or all of their gas from the Dompier stations instead of respondents because of these retail price differences. See, *e.g.*, Tr. 480, 639-640, 1537-1539, 1586-1589, 1596-1597.

that its discount to Dompier and Gull conferred a competitive advantage on stations owned or supplied by distributors receiving the discount. Respondents argued that the wholesale services allegedly performed by Dompier were nonexistent or de minimis and, in any event, were fully covered by a "hauling allowance" petitioner granted Dompier in addition to its discount. Finally, there was evidence that Dompier's purchases of gasoline from petitioner increased substantially while respondent's purchases decreased. Respondents presented several different damage estimates based on differing assumptions as to how petitioner might have eliminated the challenged price difference.

Petitioner argued that the lower prices to Dompier and Gull were "functional discounts" reflecting various wholesale services Dompier and Gull performed. Petitioner also urged that respondents had failed to demonstrate that the challenged price differences caused any harm to competition because: (1) petitioner did not control the price at which Dompier or Gull resold gasoline at either the wholesale level or the retail level; (2) the respondents were not in substantial competition with Dompier, Gull, or any of the stations they owned, operated or supplied; and (3) factors other than the discounts to Dompier and Gull were responsible for the respondents' lost sales.[3]

The jury found for each respondent and awarded damages totalling $1,349,700 after trebling.

c. The district court denied petitioner's motions for a new trial and for judgment notwithstanding the verdict. Pet. App. B1-B17. The court acknowledged that "functional discounts"—those given to a buyer higher up in a supplier's distribution chain—generally do not trigger Robinson-Patman Act liability. The court, however, believed that this is not always

[3] Petitioner also sought to establish that its discounts were lawful under the "cost justification" and "meeting competition" provisos of Section 2(a) and (b), 15 U.S.C. 13(a) and (b). The district court, however, excluded the evidence on which petitioner primarily based its cost justification defense (Tr. 2871) and refused to submit the issue to the jury. The jury was instructed on petitioner's meeting competition defense.

so because "the critical question in determining the legality of a functional discount is whether the price differential has an adverse effect on competition * * *." *Id.* at B3. The court found that in this case, even though the "favored buyer[s]" (Dompier and Gull) were not in competition with the "disfavored buyers" (respondents), the evidence demonstrated that petitioner's discounts to Dompier and Gull adversely affected competition at the retail level. The court based its conclusion on the fact that the discounts given to Dompier and Gull exceeded the cost of the functions they performed, and those discounts were, in part, passed along to retail competitors of respondents. *Id.* at B4-B6.

3. The court of appeals affirmed. Pet. App. A1-A20. The court rejected petitioner's arguments that the Robinson-Patman Act requires only that all customers in a given functional class be treated equally and that any harm respondents suffered because Dompier "passed through" its discount to the stations it supplied in its wholesale capacity could not support a finding of Robinson-Patman Act liability. *Id.* at A7-A10. The court agreed that the Robinson-Patman Act allows "[m]anufacturers * * * to use price differentials, commonly known as wholesale or functional discounts," and that "goods generally may be sold to wholesalers at a lower price than that charged to retailers." *Id.* at A7. It also acknowledged that, "at least in their capacities as wholesalers, [Dompier and Gull] did not compete directly" with the respondents. *Id.* at A8. Nonetheless, the court concluded that "there may be a Robinson-Patman violation even if the favored and disfavored buyers do not compete, so long as the customers of the favored buyer compete with the disfavored buyer or its customers." *Ibid.*

In the court's view, a discount to the favored buyers higher in the distribution chain would violate the Act if: "(1) the discount they received was not cost-based and (2) all or a portion of it was passed on by them to customers of theirs who competed with [the disfavored buyer]." Pet. App. A8. The court found that the evidence supported a finding in respondents' favor on both issues. As to whether the discount to Dompier and Gull was "cost-based," the court noted that the respondents had introduced evidence that the wholesale "services performed by

Gull and Dompier were insubstantial." The court also agreed with the district court that petitioner "made 'no serious attempt' to provide a quantitative justification" for the discounts. As to whether the discount was passed on to stations buying from Dompier and Gull, the court pointed to evidence that "some retail stations operated or supplied by Dompier and Gull purchased gasoline at prices lower than those paid by" respondents. The court also referred to evidence that "service stations operated or supplied by Dompier often sold gasoline at retail prices that were only two or three cents higher than the price" respondents paid petitioner. Pet. App. A8-A9.

Thus, the court concluded that "[w]here, as here, the discount given to a customer higher in the distributive chain is sufficiently substantial and is unrelated to the costs of the customer's function," a supplier can be held liable under the Robinson-Patman Act for adverse competitive effects at the lower market level of the disfavored customer. Pet. App. A9-A10.[4]

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals concluded that a supplier violates Section 2(a) of the Robinson-Patman Act if it grants a wholesale discount to a firm and a jury finds (1) that the discount was not "cost based" and (2) that all or part of the discount was passed on to retailers, to the injury of other retailers who purchase directly from the supplier. In our view, that statement of the law is incorrect. Functional discounts extended to firms higher in a supplier's distribution chain are intended generally to recognize and compensate for the different marketing and distribution roles played by wholesalers and retailers. Imposing liability for downstream competitive effects of legitimate functional discounts does not advance the Act's purpose of ensuring equality

[4] The court of appeals also rejected petitioner's contention that respondents had failed to demonstrate the requisite injury to competition, noting among other things that there was "direct evidence of displaced sales." Pet. App. A10-A12. Finally, the court rejected petitioner's argument, based on *J. Truett Payne*, that the damages verdict was infirm because it supposedly could have rested on the amount of "overcharges" to respondents. Pet. App. A16-A17.

of competitive opportunity to firms at the same functional level. It also threatens to undermine other policies expressed in the antitrust laws, and creates burdensome compliance requirements for suppliers engaging in dual distribution through both wholesale and retail channels. Consequently, we urge the Court to reject a construction of the Robinson-Patman Act that imposes a new cost-justification requirement on a traditional activity that the Act was not intended to govern.

A. Price differentials between wholesalers and retailers are a sensible, routine, and pervasive means of doing business, and have long been woven into the distribution system of our economy. There is no persuasive evidence that Congress intended to alter those traditional patterns of trade in the Robinson-Patman Act. There is even less reason to believe that Congress contemplated that the Robinson-Patman Act would require suppliers to monitor their wholesalers' prices in a fashion that seriously undermines the policies of the antitrust laws.

The complex and imprecise language of the Robinson-Patman Act does not compel the holding of the court appeals. As it has done in other settings, the Court should interpret the Robinson-Patman Act in a fashion that accommodates the policies expressed in both Robinson-Patman and the Sherman Act. Such a reconciliation can be effected by holding that legitimate functional discounts to independent purchasers do not have an anticompetitive "effect" at lower levels of distribution. Because any competitive consequences at those levels are solely the result of the favored wholesaler's independent decision to "pass on" the supplier's discount, those consequences should not be deemed an effect of the original functional discount under Section 2(a).

B. The court of appeals' rationale would engender serious practical difficulties for firms seeking to comply with it, and would undermine well-established antitrust policies. Under the court of appeals' ruling, a supplier could incur Robinson-Patman Act liability even though it complied with the Act's fundamental mandate to treat similarly situated purchasers equally. To avoid liability, a supplier would be required either

(1) to attempt to preclude the independent wholesaler from passing through a portion of a wholesale discount, or (2) to eliminate the system of dual distribution. Even if the formidable practical obstacles to the former alternative could be surmounted, the likely result would be to penalize the most efficient and aggressively competitive wholesalers. And the latter alternative would directly threaten the very independent merchants that Congress sought to protect in the Robinson-Patman Act, as well as the consumers whose welfare is the focus of the antitrust laws generally.

C. Neither the legislative history nor the decisions of this Court support the application of the Robinson-Patman Act to legitimate functional discounts. The legislative history reveals that Congress considered protecting functional discounts by writing an exception into the Act that would govern different prices given to different classes of buyers. While this provision was not ultimately enacted, all available sources indicate that the buyer classification language was deleted in response to entirely separate concerns, not because Congress wanted to proscribe functional discounts. Given that a principal purpose of the Act was to protect independent wholesalers, and given the absence in the legislative history of any criticism directed at functional discounts as such, we do not read that history to mean that Congress intended to alter a traditional method of compensating independent distributors.

Nor do the precedents of this Court support the court of appeals' holding. The court of appeals relied on *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948); *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428 (1983); and *Perkins* v. *Standard Oil Co.*, 395 U.S. 642 (1969), interpreting those decisions to hold that any adverse competitive effect on "customers of the favored buyer" who "compete with the disfavored buyer or its customers" can trigger Robinson-Patman Act liability. Those decisions, however, stand for far narrower propositions. *Morton Salt* holds only that a supplier cannot give a retail customer a steeper discount than a wholesale customer. And *Falls City* merely holds that a discriminatory discount given to one

wholesaler relative to another wholesaler can trigger liability if the customers of each wholesaler compete. Neither of those situations is present here.

The Court's opinion in *Perkins* could be read to apply here, but in light of the distinctive facts involved in that case, it should not be interpreted so broadly. In *Perkins*, the favored buyer, unlike the favored buyer here, passed on a discount through a series of subsidiary firms. Consequently, the competitors in *Perkins* can be seen as two vertically integrated firms in direct competition at the retail level. In this light, the case stands for the unremarkable proposition that a supplier that discriminates between firms at the same functional level can be held liable for anticompetitive effects. *Perkins* should not be extended to a case in which the original price discrimination reflects a legitimate functional discount given to a firm whose independent pricing policies then produce competitive consequences further down the chain of distribution—consequences for which the supplier is not responsible.

D. Applying the principles described above, we believe that the judgment should be reversed. For at least a portion of the time covered by the damages award, Dompier may have functioned as a wholesaler in reselling gasoline to respondents' competitors. Any damages to respondents flowing from those sales should not be recoverable under the Robinson-Patman Act. Accordingly, the case should be remanded to the court of appeals to determine the appropriate remedy on the basis of this record.

ARGUMENT

THE ROBINSON-PATMAN ACT DOES NOT IMPOSE LIABILITY ON A SUPPLIER FOR PRICING DISPARITIES RESULTING FROM THE DECISION OF AN INDEPENDENT FIRM TO PASS THROUGH A PORTION OF A LEGITIMATE FUNCTIONAL DISCOUNT

Section 2(a) of the Robinson-Patman Act prohibits a supplier from "discriminat[ing] in price between different purchasers" of goods where the effect may be to "injure, destroy, or prevent competition with any person who either grants or knowingly

receives the benefit of such discrimination, or with customers of either of them * * *." 15 U.S.C. 13(a). This case presents the question of how this general language should be applied to functional discounts. Specifically, the issue is whether the Robinson-Patman Act imposes liability on a supplier for charging a lower price to a wholesaler than a retailer if that functional discount is subsequently determined to exceed the wholesaler's costs and the wholesaler has "passed on" all or part of that discount to other retailers.

A functional discount is one given to a purchaser based on its role in the supplier's distribution system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier.[5] As the Federal Trade Commission has observed:

> Functional discounts long have been a traditional pricing technique by which sellers compensated buyers for expenses incurred by the latter in assuming certain distributive functions. The typical functional discount system provided for graduated discounts to customers

[5] See Calvani, *Functional Discounts Under the Robinson-Patman Act*, 17 B.C. Indus. & Com. L. Rev. 543, 545 n.9 (1976); Rill, *Availability and Functional Discounts Justifying Discriminatory Pricing*, 53 Antitrust L.J. 929, 935-936 (1985); Shniderman, *"The Tyranny of Labels"—A Study of Functional Discounts Under the Robinson-Patman Act*, 60 Harv. L. Rev. 571, 572-575 (1947). Throughout this brief, we will for simplicity's sake use the terms "wholesaler" and "retailer" to refer to the differing levels in the chain of distribution that each is ordinarily understood to occupy: the retailer sells to end-users, and the wholesaler sells to retailers. Discounts based on the position occupied by a firm in the chain of distribution have sometimes been referred to as "trade discounts," and have been contrasted with discounts designed to reflect the specific function performed by a customer, regardless of its formal position in the chain of distribution, which have been labeled "functional discounts." See Pet. App. B2-B3 n.2. Because we believe that the key distinction for Robinson-Patman purposes is whether firms in the distribution chain compete for resale customers, we do not believe it useful to explore those fine distinctions here. Nor do we believe it necessary to develop in this case a comprehensive analysis to deal with the increasingly common but more complex problems that arise from functional discounts given to vertically integrated firms. Compare *Doubleday & Co.*, 52 F.T.C. 169 (1955), with *Mueller Co.*, 60 F.T.C. 120 (1962).

> classified in accordance with their place in the distribution chain, namely, wholesaler, retailer and consumer in diminishing amounts. They were intended to reflect, at least from an economic viewpoint, the seller's estimates of the value of the marketing functions performed by the various classes of customers.

Doubleday & Co., 52 F.T.C. 169, 207 (1955). As a rule, such discounts are not tied to any exact measure of the marketing costs performed by the customer. See McNair, *Marketing Functions and Costs and the Robinson-Patman Act*, 4 Law & Contemp. Probs. 334, 347 (1937). And, of course, functional discounts do "not merely cover the buyer's costs," but also include "some allowance for profit." *Ibid.*

If read without consideration of Congress's purposes and objectives, the enigmatic phrasing of the Robinson-Patman Act could be interpreted to prohibit petitioner's conduct in this case. Petitioner is a "person engaged in commerce"; it "discriminate[d] in price between different purchasers"; the "effect of [the] discrimination" was, arguably, to "injure * * * competition"; and the competitive injury was visited upon the supplier, the favored purchaser, or—in a phrase that applies to respondents—"*customers of either of them.*" 15 U.S.C. 13(a) (emphasis added). As Justice Frankfurter long ago observed, however, "precision of expression is not an outstanding characteristic of the Robinson-Patman Act." *Automatic Canteen Co.* v. *FTC*, 346 U.S. 61, 65 (1953).[6] Consequently, this Court has not reflexively applied the language of the Act to new situations, but instead has carefully analyzed a particular challenged pricing arrangement in order to determine how to apply the policies and purposes of the Act. *Ibid.* The Court has also insisted that the Robinson-Patman Act be read with due regard for the procompetition policies expressed in the antitrust

[6] See also *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968) ("Robinson-Patman amendments by no means represent an exemplar of legislative clarity."); *id.* at 359-360, 362 (Harlan, J. dissenting) (describing the Robinson-Patman Act as "confusing," "inconsistent," and a "notoriously amorphous statute").

laws. See *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 456-458 (1978); *Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U.S. 69, 80-81 (1979); *Automatic Canteen Co.*, 346 U.S. at 63, 74. In our view, therefore, the language of the Robinson-Patman Act should not be construed to impose liability on a supplier where the supplier gives a legitimate functional discount to a purchaser, and the purchaser makes an independent decision to pass along all or part of that discount to its customers. In those circumstances, the discount should not be regarded as a form of discrimination that has "the effect of * * * injur[ing], destroy[ing], or prevent[ing] competition with * * * the customers of either" the supplier or the favored purchaser.

A. The Regulation Of Functional Discounts Does Not Further Congress's Intent To Ensure Equality Of Competitive Opportunity To Purchasers At The Same Functional Level

The Robinson-Patman Act was intended to remedy what Congress perceived as unfair and economically unjustified pricing concessions granted to large retail chains at the expense of competing independent merchants. See *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 349-350 (1968); *FTC* v. *Henry Broch & Co.*, 363 U.S. 166, 169 (1960); *Hearings on H.R. 8442, H.R. 4995, and H.R. 5062 Before the House Committee on the Judiciary*, 74th Cong., 1st Sess. 5-6 (1935); F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 3-11 (1962); 1 ABA Antitrust Section, Monograph No. 4, *The Robinson-Patman Act: Policies and Law* 8-21 (1980). The overriding theme of the congressional debate on the Act was the need to combat the "increased market power and coercive practices of chainstores and other big buyers that threatened the existence of small independent retailers." *Great Atlantic & Pacific Tea Co.*, 440 U.S. at 75-76. Congress sought to "assure, to the extent reasonably practicable, that businessmen at the *same functional level* would start on equal competitive footing so far as price is concerned." *FTC* v. *Sun Oil Co.*, 371 U.S. 505, 520 (1963) (emphasis added). See also *Abbott Laboratories* v. *Portland Retail Druggists Ass'n*, 425

U.S. 1, 12 (1976) ("the focus of Robinson-Patman is on competition 'at the same functional level' ").[7]

The objectives of the Robinson-Patman Act would not be served by extending its reach to discounts to firms at *different* functional levels in a distribution system.[8] Functional discounts have long been thought to fall outside of the coverage of the Robinson-Patman Act precisely because they do not raise the concern for a "level playing field" for competitors that the Act sought to protect. Thus, as the Federal Trade Commission observed in *Doubleday & Co.*, 52 F.T.C. at 207-208, "[a] discount granted to * * * wholesalers [does] not injure retailers who received no equivalent price reduction, since they [do] not compete for the consumer's business." Consequently, "functional discounts to single-function distributors were considered above legal reproach." *Id.* at 208. See also *Boise Cascade Corp.*,

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[7] The Act did not outlaw all price differences. Thus, sellers remain free under the Act to demonstrate that a lower price to a particular purchaser reflects "only due allowance for differences in the cost of manufacture, sale, or delivery" (15 U.S.C. 13(a)), to charge lower prices in response to "an equally low price of a competitor" (15 U.S.C. 13(b)), and to adjust prices as necessary to accommodate a variety of market conditions that might arise in the ordinary course of business. 15 U.S.C. 13(a).

[8] Of course, the discounts must be provided to firms that are "higher" in the distribution chain. Giving a greater discount to a retailer than a wholesaler can indeed violate the Act and was one of the principal problems at which Congress aimed.

> A typical price discrimination detrimental to competition arises from *lower* prices granted to large retailers than to wholesalers or jobbers. For in such a case, the retailer paying the preferential price can resell to consumers at lower prices than those retailers who pay more to the wholesalers which are charged a higher price by the supplier. Hence the forbidden statutory "injury" to competition *with* the recipient of the discriminatory lower price – the retailer paying less – may readily come to pass on the retailer level.

F. Rowe, *supra*, at 175 & n. 9 (citing *FTC* v. *Morton Salt Co.*, 334 U.S. 37 (1948) as the "classic case" of this genre). But "there will normally be no Robinson-Patman problems if a seller charges a *higher* price to its customers *further down* the distributional chain, *e.g.*, if the seller charges more to retailers than to wholesalers." 3 E. Kintner & J. Bauer, *Federal Antitrust Law* § 22.14, at 307 (1983).

107 F.T.C. 76, 199 (1986) ("If the wholesaler does not sell to end-user customers in competition with the retailer, the difference in the prices that the wholesaler and the retailer pay cannot support a claim of secondary line competitive injury under the Act."), rev'd on other grounds, 837 F.2d 1127 (D.C. Cir. 1988); *General Foods Corp* , 52 F.T.C. 798, 824 (1956) ("a seller is not forbidden to sell at different prices to buyers in different functional classes" that do not compete). The lower courts have generally agreed with this view.[9]

It is thus no surprise that functional discounts have long been assumed to be fully consistent with the Robinson-Patman Act. The marketing strategy of using a "dual distribution" network, in which a firm sells directly at different prices to retailers and wholesalers, was a prevalent practice at the time the Act was passed.[10] Far from seeking to disrupt this traditional pattern of trade, with its multiple layers of independent firms, Congress

[9] Statements in a number of opinions reflect this assumption. See, *e.g.*, *O'Byrne* v. *Cheker Oil Co.*, 727 F.2d 159, 164 (7th Cir. 1984); *Dart Industries, Inc.* v. *Plunkett Co. of Oklahoma, Inc.*, 704 F.2d 496, 499 (10th Cir. 1983); *FLM Collision Parts, Inc.* v. *Ford Motor Co.*, 543 F.2d 1019, 1024 (2d Cir. 1976), cert. denied, 429 U.S. 1097 (1977); *American Oil Co.* v. *McMullin*, 508 F.2d 1345, 1353 (10th Cir. 1975). But see *Standard Oil Co.* v. *FTC*, 173 F.2d 210 (7th Cir. 1949), rev'd on other grounds, 340 U.S. 231 (1951), discussed *infra* at 20-22.

[10] See, *e.g.*, McNair, *supra*, 4 Law & Contemp. Probs. at 346 ("Among the earliest straddles of this type were those made by manufacturers who decided to sell part of their output directly to retailers while continuing to sell the rest of it through wholesalers. The trade discount was the characteristic pricing device used to meet the requirements of this situation."); 1 J. von Kalinowski, *Antitrust Laws and Trade Regulation* § 2.04[1], at 2-105 to 2-106 (1989) (noting that distribution through "middlemen, *i.e.*, wholesalers or jobbers, who, in turn, supplied the retailers with whom the ultimate consumer dealt" was a standard mode of distribution when Clayton Act was originally passed in 1914; the impetus for passage of Robinson-Patman Act amendments to Clayton Act was the threat to the "established manufacturer-wholesaler-retailer hierarchy [posed] by the emergence of new forms of marketing organizations," primarily chain stores, "which usurped the functions of the middleman or combined the functions of all three businesses into one operating unit"). See generally J. Palamountain, *The Politics of Distribution* 18-23 (1955) (describing traditional distribution systems).

enacted the Robinson-Patman Act in response to the vertical integration of "chain stores" that were using their buying leverage to extract more favorable prices than true wholesalers were getting, to the detriment of independent wholesalers and their retail customers.

Accordingly, the text of the Robinson-Patman Act should not be read to regulate legitimate functional discounts.[11] The Act governs pricing disparities only when "the effect of such discrimination may be • • • to injure, destroy, or prevent competition" with the supplier, the favored buyer, or customers of either of them. 15 U.S.C. 13(a). The natural "effect" of legitimate functional discounts is not to produce competitive harms at the different levels of distribution involved. Consequently, the competitive effects that flow from a wholesaler's independent decision to "pass on" the supplier's functional discount should not be deemed an effect of the original discount.[12]

[11] In order to be "legitimate," a functional discount must be given to a firm that performs some services for the supplier (such as physically delivering products on resale, managing inventory, or assuming credit risks) not performed by firms further down the chain of distribution. Clearly, therefore, suppliers that employ discriminatory pricing tactics at the retail level by means of a "dummy" wholesaler, controlled by the supplier, cannot evade liability under the Act. In that situation, the dummy firm's customers would be deemed the customers of the supplier for purposes of the Act. Cf. *Purolator Products, Inc.* v. *FTC*, 352 F.2d 874 (7th Cir. 1965), cert. denied, 389 U.S. 1045 (1968); *General Auto Supplies, Inc.* v. *FTC*, 346 F.2d 311 (7th Cir.), cert. dismissed, 382 U.S. 923 (1965). Cf. *FTC* v. *Fred Meyer, Inc.*, 390 U.S. 341, 353 (1968) (discussing doctrine of liability under 15 U.S.C. 13(d) when "a supplier in effect supplants his intermediate distributors in dealings with those to whom the distributors resell and favors some of the distributors' accounts over others"). Likewise, a functional discount must accurately reflect competitive realities. "[A]mbiguous labels, which might be used to cloak discriminatory discounts to favored customers" cannot defeat the coverage of the Act. *FTC* v. *Ruberoid Co.*, 343 U.S. 470, 475 (1952) (disregarding supplier's classification of certain buyers as "wholesalers" when they in fact competed with other purchasers at the "applicator" level).

[12] While it would be possible under the literal language of the Act to trace the competitive effects of functional discounts to the next competitive level under the "customers" clause of Section 2(a), Congress obviously intended that this Court give the broad commands of the antitrust laws, of which the

B. The Requirement That Functional Discounts Be "Cost Based" If An Independent Supplier Passes Them On To Firms Lower In The Chain Of Distribution Would Present Difficult Compliance Problems And Would Directly Conflict With Policies Embodied In The Antitrust Laws

1. The court of appeals recognized the existence and legitimacy of "functional discounts." Nevertheless, the court insisted on severely restricting the circumstances in which a dual distributing supplier may safely extend them. Read most broadly, the court's opinion would require a supplier to show that a functional discount is justified by the wholesaler's costs in order to protect itself from liability arising from the wholesaler's "passing on" of the discount to retailers that compete with retailers who purchase directly from the supplier.[13]

Such a requirement would deprive suppliers who engage in dual distribution of any adequate means of avoiding Robinson-Patman Act liability. A supplier could not find refuge in conduct that would normally provide a safe harbor under the Robinson-Patman Act: treating all purchasers at the same functional level equally. Rather, it would be forced to undertake a potentially expensive compliance program, with uncertain results. The court of appeals' approach would thus undermine the ability of firms to establish pricing programs that satisfy the

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Robinson-Patman Act is a part, concrete and particularized content in light of their history, policies, and purposes. For example, the Sherman Act's sweeping prohibition of any "restraint of trade," if read literally, "would outlaw the entire body of private contract law," *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 108 S. Ct. 1515, 1526 (1988) (Stevens, J., dissenting), but this Court has recognized that Congress obviously had no such intention. Accordingly, the Court has construed Section 1 to encompass only "unreasonable" restraints of trade. See, *e.g.*, *NCAA* v. *Board of Regents*, 468 U.S. 85, 98 & n.17 (1984). Similar principles should be applied here.

[13] The contours of the court's holding are uncertain, as the court stated that suppliers may be held responsible for retail level disparities if a functional discount is "sufficiently substantial" and is "unrelated to the costs of the customer's function," without affording more precise definitions of those terms. Pet. App. A9.

Act. This Court should hesitate before embracing a rule whose ramifications make it extraordinarily burdensome for firms to achieve compliance, yet simultaneously exposes them to treble damages.[14] An additional factor that also counsels restraint is the absence of any reason to believe that the facts of this case are representative of a widespread "problem" calling for a solution that imposes across-the-board regulatory restraints on all dual distributors.[15]

2. More fundamentally, the court's rule transgresses this Court's admonition that the Robinson-Patman Act must be construed, whenever possible, in a manner that is consistent with the procompetition policies expressed in the antitrust laws. See *United States* v. *United States Gypsum Co.*, 438 U.S. 422, 456-458 (1978); *Great Atlantic & Pacific Tea Co.* v. *FTC*, 440 U.S. 69, 80-81 (1979).[16] There is without question a degree of

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[14] Imposing such a framework on dual distributors seems particularly unwarranted because, absent special circumstances (for example, where one group of retailers has a lower elasticity of demand for the supplier's product *and* is contractually bound or otherwise constrained to purchase only from the supplier rather than from an independent wholesaler), a supplier would have no economic incentive to charge its own retailers a higher price than the effective price charged by independent wholesalers.

[15] This case appears to reflect rather anomalous behavior on the part of the supplier. One possible explanation for what happened here is afforded by Federal Energy Administration (FEA) regulations that governed the pricing of petroleum products in the 1970s, and which apparently constrained to some degree petitioner's flexibility in adjusting its prices. See generally *Typhoon Car Wash, Inc.* v. *Mobil Oil Corp.*, 770 F.2d 1085, 1087-1088 (Temp. Emer. Ct. App.), cert. denied, 474 U.S. 981 (1985); Tr. 2083-2086 (explanation by petitioner's witness that altering price to distributors in the Spokane market would have "cost" petitioner several million dollars under FEA "cost bank" accounting procedures). Petitioner apparently attempted to reduce its wholesale discount in 1973 and 1977, but that effort was challenged on the basis that it violated then-applicable FEA regulations. Tr. 2038, 2084-2085. The district court rejected petitioner's asserted defense based on the FEA regulations the first time the case was tried. That ruling was affirmed on appeal (663 F.2d at 933) and is not at issue here.

[16] In *United States Gypsum Co.*, the Court held that the "meeting competition" defense under the Robinson-Patman Act could not justify interseller verification of prices because of the vast potential of that practice to engender

tension between the policy of the Sherman Act to protect the competitive process, not competitors, and the objective of the Robinson-Patman Act to regulate seller pricing practices in order to protect some individual competitors. But the Court has sought to reduce the friction between the two statutes by declining to expand the coverage of the Robinson-Patman Act in ways that would "help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Automatic Canteen Co.*, 346 U.S. at 63.

The court of appeals gave insufficient attention to Sherman Act concerns. To begin with, a supplier cannot directly prevent an independent wholesaler from undercutting the supplier's price to retailers. An agreement between the supplier and wholesaler concerning the wholesaler's resale price would be a per se violation of the Sherman Act. *Business Electronics Corp.* v. *Sharp Electronics Corp.*, 108 S. Ct. 1515 (1988); *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752, 763 (1984); *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911).

Nor are the other possibilities any more satisfactory. In theory, the supplier could offer to match the lowest price offered by any independent wholesaler with which it deals, thereby equalizing the competitive environment. But in practice it is doubtful that a supplier could determine the lowest price being offered by independent firms, and make the corresponding adjustments to its own prices, on a continuing basis--particularly in an industry such as the one involved in this case where prices may change daily on a market-by-market basis. Moreover, the supplier might not be able to match the lowest price available from a wholesaler without pricing below its own costs (and possibly opening itself to a charge of predatory pricing). Indeed, the more efficient the wholesaler, the less likely it

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price fixing (438 U.S. at 458-459). In *Great Atlantic & Pacific Tea Co.*, the Court held the same defense did not compel buyers to disclose to sellers the quotes of their competitors because of concerns that such a requirement would "frustrate competitive bidding" (440 U.S. at 80).

is that the supplier *could* match the lowest prices available from the wholesaler.[17]

A supplier would also encounter difficulties in seeking to tailor the wholesale discount precisely to the costs and pricing strategies of the individual wholesalers, with the goal of eliminating any possibility that the discount could be passed through. The supplier is unlikely to have the necessary information about the costs and marketing strategies of the firms with which it competes for sales to retailers. Cf. *Automatic Canteen Co.* v. *FTC*, 346 U.S. at 68-69 (noting the impracticality of charging buyer with responsibility of discovering seller's costs that are not only not in its hands, but "are ordinarily obtainable even by the seller only after detailed investigation of the business"). Nor is the wholesaler likely to be eager to provide information that may result in its wholesale discount being reduced.

Moreover, the burden of requiring such customer-by-customer tailoring of the discount could be overwhelming. The Court has consistently refused to construe the Robinson-Patman Act to impose such burdens. Cf. *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428, 449 (1983) (a requirement that the "meeting competition" defense be applied on a customer-by-customer basis might make meaningful price competition unrealistically expensive); *United States* v. *Borden Co.*, 370 U.S. 460 (1962) (the cost justification defense can be based on customer groups rather than individual customers). And if the seller failed to calibrate the discount precisely, its discrimination among wholesalers could cause precisely the type of injury to wholesalers that the Robinson-Patman Act is designed to forestall.

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[17] A supplier could try the alternative strategy of reducing the wholesale discount in order to eliminate the threat that a wholesaler would undercut the supplier's retail prices. But this would only penalize all but the most efficient wholesalers and, by driving some wholesalers out of business, would reduce price competition between wholesalers and the supplier, undermining the pro-consumer congressional policy embodied in the antitrust laws. See *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 343 (1979).

Faced with no adequate means of limiting their exposure to Robinson-Patman Act liability under the court of appeals' theory, many suppliers might forego dual distribution altogether. Some might abandon wholesalers (or eliminate the wholesale discount, which is tantamount to the same thing) and deal only with retailers. Others might refuse to sell directly to retailers, channeling all of their goods through wholesalers. Still other suppliers might be encouraged to integrate vertically downstream, perhaps by absorbing smaller marketing organizations. In any of these situations, the losers would include the nonintegrated "independent merchant," *FTC* v. *Fred Meyer, Inc.*, 390 U.S. at 349-350—resulting in the very type of harm that Congress intended to avoid under the Robinson-Patman Act.

Also among the losers would be consumers. Depriving consumers of the benefits of efficient distribution systems is not only irreconcilable with the procompetition policies of the Sherman and Clayton Acts, but also runs flatly contrary to the purposes of Congress in enacting the Robinson-Patman Act. See, *e.g.*, *Automatic Canteen*, 346 U.S. at 72 n.11 ("Time and again there was recognition in Congress of a freedom to adopt and pass on to buyers the benefits of more economical processes."); Silcox & MacIntyre, *The Robinson-Patman Act and Competitive Fairness: Balancing the Economic and Social Dimensions of Antitrust*, 31 Antitrust Bull. 611, 663 (1986).

3. For precisely the reasons outlined above, the only other reported appellate decision to hold a supplier liable under the Robinson-Patman Act for comparable independent pricing decisions by a wholesaler has been roundly criticized. See *Standard Oil Co.* v. *FTC*, 173 F.2d 210 (7th Cir. 1949), rev'd on other grounds, 340 U.S. 231 (1951). As a remedy in that case, where the wholesaler had resold to retail stations below Standard's price, the Commission ordered Standard not to charge its wholesalers a price lower than Standard's price to its retail customers when the wholesalers were reselling below Standard's retail price. 173 F.2d at 217. The court of appeals, recognizing the manifest impossibility of compliance with this provision as written, modified it to direct Standard not to sell gasoline to

wholesalers at prices less that its retail price, in circumstances where Standard knew or had reason to know that the wholesalers would undercut Standard's retail price in reselling to retailers who compete with the direct purchasing retailers. *Ibid.*

With rare unanimity, commentators have condemned the *Standard Oil* order.[18] The *Report of the Attorney General's National Committee to Study the Antitrust Laws* 206-207 (1955) (footnotes omitted) (quoted at 3 E. Kintner & J. Bauer, *supra* § 22.15, at 320 n.306), explained the concerns raised by the order in terms that apply with equal force here:

> A supplier according functional discounts to a wholesaler or other middleman while at the same time marketing directly to retailers encounters serious legal risks under the Commission's *Standard Oil* ruling. The supplier is charged with legal responsibility for the middlemen's pricing tactics, and hence must control *their* resale prices lest they undercut him to the unlawful detriment of his directly purchasing retailer customers. Alternatively, the seller may forego his operational freedom by matching *his* quotations to retailers with *theirs*. Of course the supplier may avoid these risks by abolishing the functional differential or abandoning sales to middlemen altogether.

The Committee concluded that "imposing on any dual supplier a legal responsibility for the resale policies and prices of his in-

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[18] See, *e.g.*, F. Rowe, *supra*, at 196-205 (criticizing *Standard Oil* and aguing that "any lower price in favor of a distributor always creates a capacity to 'pass it on' and underprice the supplier (or other distributors) in resales to the 'retailer' level") (emphasis omitted); C. Edwards, *The Price Discrimination Law* 304-313 (1959) (noting "unavoidably awkward" consequences of holding manufacturers liable for differences in prices paid by directly supplied retailers and those who purchase through distributors); 5 J. von Kalinowski, *Antitrust Laws and Trade Regulation* §§ 31.02-03, at 31-66 to 31-91 (1989); 3 E. Kintner & J. Bauer, *supra* § 22.15, at 320 (critizing *Standard Oil* and *Perkins*, and suggesting that they be understood as "arising in unusual circumstances, which should preclude them from being extended beyond their facts"). See also Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman*, 60 Yale L.J. 929, 942-944 (1951).

dependent distributors contradicts basic antitrust policies." *Ibid.*

Indeed, the Federal Trade Commission itself later abandoned this theory. In subsequent proceedings in the *Standard Oil* case, the Solicitor General, in a brief filed on behalf of the Commission in this Court, expressly disavowed any purpose "to require Standard to eliminate legitimate functional pricing or to make it responsible for the pricing practices of its wholesaler[s]." As one factor supporting that decision, the Solicitor General noted the conflict between the order and " 'broader antitrust policies.' " See Gov't Reply Br. at 32 in *FTC* v. *Standard Oil Co.*, 355 U.S. 396 (1958).[19]

C. Neither The Legislative History Of The Robinson-Patman Act Nor The Decisions Of This Court Support The Significant Limitations Placed On Functional Discounts By The Court Of Appeals

In light of the practical problems that the court of appeals' rule would spawn, as well as its capacity to undermine sound antitrust policies, this Court should not endorse such a construction of the Act's inherently imprecise language unless compelled to do so by evidence of congressional intent or precedents of this Court. Neither the legislative history nor this Court's decisions require that result.

1. The Robinson and Patman bills as originally introduced exempted from their coverage differences in price based on the classification of the buyer.[20] Counsel to the United States Wholesale Grocers Association and principal draftsman of the

[19] We have reproduced the relevant portion of the government's brief in *Standard Oil* in an appendix, *infra*, 1a-2a.

[20] In each chamber, the bills provided that "nothing herein contained shall prevent differentials in prices between purchasers depending solely upon whether they purchase for resale to wholesalers, to retailers, or to consumers * * *." H.R. 8442, 74th Cong., 1st Sess. (1935); S. 3154, 74th Cong., 1st Sess. (1935).

Robinson-Patman bill, H.B. Teegarden, explained that these bills would "permit[] manufacturers and others to continue, so far as they desire, to give differentials between those classes of buyers as they have since time immemorial." *House Hearings on H.R. 8442, H.R. 4995, H.R. 5062*, 74th Cong., 1st Sess. 106 (1935).[21]

The bills that emerged from the Committees retained the protection for discounts based on the class of buyer. The Senate and House Committee Reports explained that "[s]uch differentials, so long as equal treatment is required within the class, do not give rise to the competitive evils at which the bill is aimed; while to suppress them would produce an unwarranted disturbance of existing habits of trade." S. Rep. No. 1502, 74th Cong., 2d Sess. 5 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess. 8-9 (1936).

Although the proposed exemption for class-of-buyer discounts was ultimately deleted, the legislative materials suggest that this was not because Congress rejected the theory supporting it, as expressed in the Committee reports. Rather, the exemption was deleted because farm interests objected to certain language in the provision, for reasons unrelated to functional discounts as such. As reported out of committee, the House bill not only exempted class-of-buyer discounts from the nondiscrimination rule, but also included complex provisions governing the classification of vertically integrated buyers. See H.R. Rep. No. 2287, *supra*, at 8-9. The bill provided that when a buyer functioned both on the wholesale and retail levels, it would be classified by the "character of the selling." *Id.* at 1-2.

[21] The bill introduced by Rep. Utterback as an alternative to the Patman bill contained a similar exemption for "differences in price or in terms of sale founded solely and in good faith upon classification of customers as wholesalers or jobbers, remanufacturers, or processors, retailers or consumers." H.R. 10486, 74th Cong., 2d Sess. (1936); *House Hearings on H.R. 4995, H.R. 8442, H.R. 10486*, 74th Cong., 2d Sess. 271 (1936). As Rep. Utterback explained, the purpose of the legislation was not to prohibit all price discrimination, but only discrimination in cases where "some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other." 80 Cong. Rec. 9416 (1936).

Farm interests were concerned that under that provision agricultural cooperatives might fail to qualify for wholesale discounts.[22] Consequently, although the buyer-classification provision passed in the Senate bill,[23] it was deleted from the House bill,[24] and the Senate acceded to the House version without explanation.[25]

This legislative record discloses no intention on the part of Congress to call into question the practice of offering functional discounts, or to compel suppliers to continue dual distribution programs only on pains of monitoring the costs and prices of their wholesale customers. "[F]unctional discounts were a common business practice when the Act was passed, and it might be presumed that Congress would not have acted merely by omission if it truly wanted to forbid such a common practice." *Boise Cascade Corp.*, 107 F.T.C. 76, 209 (1986), rev'd on other grounds, 837 F.2d 1127 (D.C. Cir. 1988). At best, the record suggests that Congress evinced special solicitude for functional discounts, intended to protect them, and dropped specific

[22] In debate on the provision, Rep. Patman addressed the "opposition by the farm organizations [to] the classification section," explaining that "[t]hey were opposed to the classification of wholesalers and retailers." 80 Cong. Rec. 8113 (1936). Letters from these groups reprinted in the Congressional Record make plain that the ground for their objection was that under "the classifications of purchasers • • • farmer-owned and farmer-controlled cooperative associations would be deprived of their wholesalers' and jobbers' discounts." One letter proposed that "this classification [be] eliminated entirely or an exemption granted to cooperative associations." *Id.* at 8116-8118.

[23] 80 Cong. Rec. 6427-6428, 8418-8419 (1936).

[24] 80 Cong. Rec. 8122-8123 (1936) (remarks of Rep. Boileau) (describing Judiciary Committee's agreement to deletion of buyer classification language, as suggested by the farm organizations, "primarily, because it would be detrimental to the best interests of the farmer cooperatives"); *id.* at 8139 (remarks of Rep. Miller) (offering amendment to delete buyer classification subsection); *id.* at 8223 (passing the amendment without further discussion).

[25] See H.R. Conf. Rep. No. 2951, 74th Cong., 2d Sess. 6 (1936). Accounts of those events are provided in C. Edwards, *supra*, at 25 n.8, 42-44; Silcox & MacIntyre, *supra*, 31 Antitrust Bull. at 637; F. Rowe, *supra*, at 18; J. Palamountain, *supra*, at 226-227; Shniderman, *supra*, 60 Harv. L. Rev. at 585-586; Calvani, *supra*, 17 B.C. Indus. & Com. L. Rev. at 545-546 n.14; and McNair, *supra*, 4 Law & Contemp. Probs. at 349-350.

language for doing so only because objections were raised on entirely other grounds (by farm interests afraid of losing their functional discounts). Even if read less sympathetically, the history suggests at most that the question is an open one under the Act. Cf. 107 F.T.C. at 209 (finding the legislative history to be "inconclusive" on the practice of giving functional discounts).

2. The court of appeals relied on three decisions of this Court to support the proposition "there may be a Robinson-Patman violation even if the favored and disfavored buyers do not compete, so long as the customers of the favored buyer compete with the disfavored buyer or its customers." Pet. App. A8, citing *FTC* v. *Morton Salt Co.*, 334 U.S. 37, 43-44 (1948); *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, 460 U.S. 428, 434-435 (1983); *Perkins* v. *Standard Oil Co.*, 395 U.S. 642, 646-647 (1969). None of those decisions justifies the analytical approach to functional discounts that the court of appeals adopted.

In *FTC* v. *Morton Salt Co.*, a large, vertically integrated retail buyer was able to obtain quantity discounts from the supplier that were not available to the wholesaler, and, consequently, the wholesaler's customers were harmed in competition with the favored buyer. *Morton Salt* thus involved "the paradigm setting envisioned by Congress—a quantity discount to large buyers." *Boise Cascade Corp.* v. *FTC*, 837 F.2d 1127, 1139 (D.C. Cir. 1988). That decision is not at all applicable to a case such as this one in which the supplier charges a *higher price* to a retailer than a wholesaler. See F. Rowe, *supra*, at 198 n.103 ("[T]he Supreme Court's Morton Salt decision bars a *lower price to a retailer* than to wholesalers whose customers competed with the 'favored' retailers • • •.").

In *Falls City Industries, Inc.* v. *Vanco Beverage, Inc.*, a supplier charged two *wholesalers* different prices, which were then passed on to competing retailers. Although the wholesalers were precluded from competing with each other as a matter of state law, 460 U.S. at 432, the Court found that the requirement of competitive injury was satisfied, explaining that "the competitive injury component of a Robinson-Patman Act violation

is not limited to the injury to competition between the favored and disfavored purchaser; it also encompasses the injury to competition between their customers." *Id.* at 436. *Falls City* governs cases in which the supplier has created the disparity between the purchase prices of businesses operating at the same functional level, and can therefore reasonably anticipate that the disparity it has created will persist downstream. The Court had no occasion to consider functional discounts given to firms at different competitive levels.

The only decision of this Court that lends some support to the court of appeals' formulation is *Perkins* v. *Standard Oil Co.* In that case, the disfavored buyer, Perkins, purchased gasoline from Standard Oil in wholesale and retail capacities. Standard's favored buyer was Signal Oil, which passed on the discounts to its 60% owned subsidiary Western, which in turn passed on the discounts to its 55% owned subsidiary Regal. Regal operated retail stations in competition with Perkins and was able to undercut Perkins' prices. Perkins sued the supplier, alleging that its retail operations were harmed by price discrimination in favor of Signal. 395 U.S. at 645-646. The Court held that Regal should be considered a "customer" of Signal (the favored purchaser), and that Perkins could recover for its competitive injury, because a contrary reading of the statute "would allow price discriminators to avoid the sanctions of the Act by the simple expedient of adding an additional link to the distribution chain." *Id.* at 647.

Perkins need not and should not be read more broadly than its distinctive facts. The favored buyer in *Perkins* was part of a linked chain of corporate entities functioning at the wholesale and retail levels. 395 U.S. at 645, 648. Taking into account those corporate affiliations, the supplier's violation in *Perkins* consisted simply in discriminating in price between two rival businesses that competed as vertically integrated retailers.[26] The discrimination, therefore, was given to customers at the same

[26] This was the view of the case held by Justice Marshall, 395 U.S. at 651 (concurring in part and dissenting in part), who would have treated the parent and subsidiaries as essentially one business entity and would therefore have

functional level.[27] In this case, by contrast, independent pricing decisions by wholesalers are an intervening factor between the supplier and the ultimate retail customer. Because the considerations bearing on competitive consequences in this setting are quite different, and were not examined or applied in *Perkins*, that case should not be extended here.[28]

D. The Judgment In This Case Must Be Reversed Because A Portion Of The Damages Award Against Petitioner May Reflect Injury From Pricing Practices That Did Not Violate The Robinson-Patman Act

Under the principles described above, the judgment against petitioner cannot stand. It appears that for at least a portion of the time during which petitioner sold gasoline to Dompier at lower prices than it sold to respondents, Dompier functioned as a wholesaler reselling gasoline to retail stations that competed with respondents. Because any such sales by petitioner could reflect legitimate functional discounts, the court below would

treated Signal as a competitor of Perkins, without "intimat[ing] even by indirection, what the result would be if wholly independent firms had intervened in the distribution chain." Although the Court did not respond to the point, it is not entirely clear today that the Court would treat the interlocking entities in *Perkins* as other than a single economic unit for antitrust purposes. Cf. *Copperweld Corp.* v. *Independence Tube Co.*, 467 U.S. 752 (1984).

[27] The court in *Perkins* may also have viewed Perkins as being a wholesaler itself, just as the favored purchaser was characterized as a wholesaler. See 395 U.S. at 644.

[28] To be sure, some statements in the majority opinion in *Perkins*, taken out of context, could be read to support the court of appeals' holding that competitive injury can be found if "the customers of the favored buyer compete with the disfavored buyer • • •." Pet. App. A8. See 395 U.S. at 647-648, 649. But the opinion in *Perkins* did not expressly consider claims (like those asserted here) of injury flowing from competition between the disfavored buyer and *unaffiliated* customers of the favored buyer. Indeed, the Court in *Perkins* did not even cite the *Standard Oil* decision – the only case that supports the court of appeals' approach here that a wholesale discount "passed on" through independent pricing policies can give rise to Robinson-Patman liability on the level of directly purchasing retailers.

have erred in holding petitioner liable for downstream injuries caused by the resale of that gasoline at prices that undercut petitioner's sales to respondents.

To be sure, as we noted in our brief at the certiorari stage, the jury may in fact have viewed Gull and Dompier largely as retailers in competition with respondents and thus may have imposed liability without regard to any "pass-through" of a wholesale discount. Gov't Amicus Br. 16-17. To the extent that the damages award rested on such a finding, it would not be improper under Section 2(a), as we construe it. However, even though Gull apparently never operated solely as a wholesaler, and Dompier concededly was in the retail business beginning in 1974 (in the early portion of the damages period) the record suggests that for a time Dompier may have sold gasoline at wholesale to stations that it did not own. See Gov't Amicus Br. 17 & n.23; cf. Br. in Opp. 4-5 & n.7; 18. The record also suggests that the proof of damages was not segregated by time period so as to permit ready elimination of any impermissibly imposed amounts. For those reasons, we believe that the judgment must be reversed and the case remanded for further proceedings in the lower courts.[29]

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[29] Even if the Court rejects our position and agrees with the court of appeals that a supplier may in certain circumstances be held liable under the Robinson-Patman Act for independent pricing decisions by an unaffiliated wholesaler who received a functional discount, it is important to clarify the standards under which such a finding of such liability would be appropriate. At a minimum, we think a supplier would have to be shown to have had a degree of knowledge that a functional discount would be passed on before liability would attach in these circumstances. That test could perhaps encompass imputed knowledge when reasonable to do so, but should not be so stringent as to require suppliers to set up price monitoring systems that might encourage anticompetitive behavior. Cf. *United States* v. *United States Gypsum Co.*, *supra*.

In addition, the court of appeals failed to articulate precise or workable standards for implementing its principle that a functional discount that is passed on must be "cost based" in order to pass muster under the Act. Uncertainty and confusion over the legal boundaries of the decision could unduly discourage dual distribution systems. For example, it would be important to recognize that a discount provided to wholesalers may reflect the value of services that are not obvious on their face (such as assuming credit risks); moreover, the discount would normally include a profit component. Consequently, it should not be sufficient merely to show knowledge on the part of a supplier that the discount exceeds more obvious or readily quantifiable costs, such as transportation expenses. Furthermore, any evaluation of costs, in our view, should operate on a general level without insisting upon detailed cost accounting by a supplier before it may extend a discount. It would not generally be efficient to force a supplier to learn its wholesaler's business in such detail as to be able to evaluate costs with precision. Finally, in light of the fact that the Robinson-Patman Act covers a wide universe of business relations, any cost-based test should be sensitive to particular facts, methods, customs, and understandings that prevail in different commercial environments.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded for further consideration.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

JUDY WHALLEY
Acting Assistant Attorney General

THOMAS W. MERRILL
Deputy Solicitor General

MICHAEL R. DREEBEN
Assistant to the Solicitor General

CATHERINE G. O'SULLIVAN
STEVE MACISAAC
Attorneys

KEVIN J. ARQUIT
General Counsel
Federal Trade Commission

AUGUST 1989

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 24

FEDERAL TRADE COMMISSION, PETITIONER

v.

STANDARD OIL COMPANY

REPLY BRIEF FOR THE FEDERAL TRADE COMMISSION

* * * * *

[31]

With respect to paragraph 2 (R. 5392), which would forbid Standard from discriminating "[b]y selling such gasoline to any retailer at a price known by [Standard] [32] to be higher than the price at which any wholesaler-purchaser is reselling such gasoline to any retailer who competes with such direct retailer-customer of" Standard, the Commission has determined that it will not seek affirmance of that portion of the order. Paragraph 2 was included for the purpose of relieving what in essence was a "captive market" situation—that is, the inability of the "non-jobber" customers to obtain, either from Standard or from the wholesaler "jobbers," preferential prices which the wholesaler "jobbers" were granting in some instances to their sub-dealers. On the other hand, it was not the purpose of the Commission to require Standard to eliminate legitimate functional pricing or to make it responsible for the pricing practices of its wholesaler "jobbers." Because of the problems necessarily involved in the enforcement of paragraph 2, and in view of the need "to reconcile [an administrative] interpretation, except where Congress

has told us not to, with the broader antitrust policies that have been laid down by Congress" (*Automatic Canteen Co.* v. *Federal Trade Commission*, 346 U.S. 61, 74), the Commission has now concluded that other methods (*e.g.*, a proceeding under Section 5 of the Federal Trade Commission Act or under Section 3 of the Clayton Act) would be more appropriate to reach the evil at which paragraph 2 was directed.[28]

* * * * *

The judgment below, we repectfully submit, should be reversed.

J. LEE RANKIN,
Solicitor General

VICTOR R. HANSEN,
Assistant Attorney General

EARL E. POLLOCK,
Assistant to the Solicitor General

EARL W. KINTNER,
General Counsel

JAMES E. CORKEY,
Assistant General Counsel

MILES J. BROWN,
Attorney
Federal Trade Commission

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[28] It should also be noted that the order, even without paragraph 2, forbids discrimination "directly or through any corporate or other device" (R. 5392). Thus, even without paragraph 2, the order is sufficiently broad to preclude Standard from using a subsidiary or "dummy" wholesaler to undercut Standards's tank-wagon customers.

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